OGC 78-1007
17 February 1978

STAT NOTE FOR: [redacted] OLC

STAT FROM : [redacted]
Associate General Counsel

SUBJECT : Civil Service Reorganization and Reform Package

In his memorandum of 16 February to you, attached, [redacted] points STAT out numerous conflicts between the proposed bill and existing law. He urges that we seek revision to completely exclude CIA from the legislation. I entirely agree. I suggest also that in our response we emphasize that these conflicts are objectionable because the nature of intelligence operations and the necessary secrecy and the need to protect secrecy, together with our unique personnel requirements, require flexibility and a minimum of monitoring by the Civil Service Commission or its successors.

[redacted] STAT

Attachment

OGC 78-0054

16 February 1978

STAT

MEMORANDUM FOR: [redacted]

FROM : [redacted]
Office of General Counsel

SUBJECT : Civil Service Reorganization and Reform Package

1. The CIA has enormous problems with the substance of this legislative package. Numerous provisions violently clash with present CIA authorities. These provisions interfere with, impair, or are completely inconsistent with 50 U.S.C. 403j; 50 U.S.C. 403g, 50 U.S.C. 403(d)(3), 50 U.S.C. 403(c), and Section 3-1 of E.O. 12036.

2. The reorganization plan at section 202(f) gives the Special Counsel to the Merit Systems Protection Board (Merit Board) the general authority to receive and investigate allegations of reprisals against employees for lawful disclosure of information concerning the violation of law or regulation. The Special Counsel is also given the authority to prescribe regulations governing the handling of such matters. These authorities vis-a-vis CIA would conflict with the oversight role of the Intelligence Oversight Board set forth in Section 3-1 of E.O. 12036. The IOB was specifically created in order to keep intelligence agency whistle-blowing within national security channels.

3. The establishment of rigid merit system principles in Title I applicable to all executive agencies conflicts with the status of CIA under 50 U.S.C. 403j. This section has been consistently interpreted as providing CIA with a statutory exception from the competitive service to allow CIA greater flexibility in performing its functions. CIA's excepted status is not even governed by Civil Service Commission excepted position schedules because Section 403j has been interpreted as placing CIA's personnel system outside of the federal personnel system completely.

4. The rigid merit system principles would hamper CIA in its staffing flexibility and requirements. For example, Section 202(1) provides that selection and advancement must be determined through fair and open competition. And Section 202(2) requires CIA to give equal consideration to all applicants, regardless of political affiliation or national origin. Principles

such as these would conflict with Section 403j. Moreover, Section 205 calls for the General Accounting Office to conduct audits and reviews of agency compliance with federal personnel policies. This section would conflict with the DCI's responsibility to protect intelligence sources and methods, particularly CIA organization, functions, etc. from provisions of law requiring personnel-related disclosures (50U.S.C. 403g and 50 U.S.C. 403(d)(3)).

5. Section 202 of Title II would give to the Merit Board, its Special Counsel, and other designated personnel the power of subpoena. This power could be utilized by the Special Counsel in the course of a whistle-blowing investigation. By the authority of Section 204, the Special Counsel can also freeze any personnel actions with substantial economic impact on the complaining employee until the investigation is complete. The agency head is required to take whatever action is determined by the Special Counsel if a reprisal is found to have occurred. If the action is not carried out, the Special Counsel can take the matter before the Merit Board for a final determination pursuant to Section 207. This entire set of procedures would conflict with the DCI's termination authority (50 U.S.C. 403(c)), with his mandate to prevent disclosures (50 U.S.C. 403(d)(3) and 50 U.S.C. 403g), the role of the IOB (Section 3-1 of E.O. 12036), and CIA's excepted personnel system (50 U.S.C. 403j).

6. Performance appraisal systems must be established by certain agencies for certain employees under Section 205. The appraisal systems must also conform to Office of Personnel Management (OPM) regulations. However, there is a discrepancy between the language of the legislation and that of the report concerning the agencies covered by the legislation. The report contends that the Tennessee Valley Authority is included, while the legislation states that it is excluded. The report also contends that CIA, unlike the Foreign Service, is not meant to be excluded, though the legislation allows for such an exclusion by OPM regulation. Even so, the thrust of this section would be to subject CIA performance appraisals to OPM control. This would conflict with the aforementioned 50 U.S.C. 403(d)(3), 50 U.S.C. 403g, and 50 U.S.C. 403j.

7. The procedures of Section 205, pertaining to demotions or dismissals based on unacceptable performance, include a requirement of 30 days' advance notice, a right to reply, and a right to representation. Also, the affected employee could appeal the matter to the Merit Board for a final determination pursuant to Section 207. These features would conflict with the aforementioned 50 U.S.C. 403(d)(3), 50 U.S.C. 403g, 50 U.S.C. 403(c) and 50 U.S.C. 403j.

8. Section 206(a) deals with adverse actions designed to promote the efficiency of the service, including removals, suspensions for less or more than 30 days, and furloughs for 30 days or less. Suspension for 30 days or more, removals, and other adverse actions must be processed under procedures

similar to those of Section 205. CIA would be covered by those procedures only to the extent that it would employ preference eligibles. When suspension is for 30 days or less, a less rigorous notice, right to reply, and right to representation is required, but the procedures involved cover CIA completely. CIA employees covered by either set of adverse action procedures could not be excluded from these procedures because both exclusion provisions use the "confidential or policy determining" language of Schedule C, which is inapplicable to CIA, as their criteria. Thus, these procedures would tend to create the same statutory conflicts created by the Section 205 procedures. Moreover, it should be noted that while adverse actions by CIA management must conform to the aforementioned procedures, the procedures curiously exclude from coverage national security adverse actions taken under 5 U.S.C. 7532.

9. In accordance with Section 207, any matter to be decided by the Merit Board will be processed under regulations established by the Merit Board and the decision may be reviewed by the Court of Claims or a U.S. Court of Appeals. Such practices would also conflict with the aforementioned 50 U.S.C.403(d)(3), 50 U.S.C. 403g, and 50 U.S.C. 403(c).

10. Title IV would extensively interfere with the CIA personnel system. Section 402(b) organizes federal managers into a Senior Executive Service (SES) for which OPM would prescribe all implementing regulations. This section allows an agency to be excluded from SES by the President, but the agency must go through OPM, with OPM then making a recommendation to the President as to whether an exclusion is advisable. If the exclusion is granted, OPM can recommend to the President a revocation at any subsequent time.

11. SES is composed of career reserved positions for career appointees and general positions for career and non-career appointees. OPM will prescribe the position criteria and regulations governing the designation of career reserved positions. Also, OPM must approve the managerial qualifications of initial career appointees in such positions.

12. All agencies covered by SES would be required to submit to OPM requests for SES positions which would include program, budget, and work-load breakdowns to justify each request. OPM, in consultation with OMB, would then allocate the positions per agency, though OPM would reserve the right to reduce any allocation at will. Additionally, OPM would be required to submit a biennial report to Congress which would reveal the numbers of SES positions in each agency.

13. Lastly, it should be noted that the number of non-career appointees is strictly limited to 15% of SES positions Government-wide, and these positions will be allocated biennially by OPM according to demonstrated need. OPM would reserve the right to make adjustments in allocations to meet any emergency needs.

14. The degree of OPM control over the allocation of SES positions allowed by section 402(b) would severely limit the adaptability of the CIA personnel system and almost certainly hamper the functions and operations of CIA. Such OPM control conflicts with the letter and the spirit of the statute establishing CIA's excepted personnel system (50 U.S.C. 403j). Further, the vast amount of detailed information which would need to be disclosed in order for the statutory scheme of SES to function must trigger the DCI's mandate to prevent disclosures (50 U.S.C. 403(d)(3) and 50 U.S.C. 403g) if that mandate is to have any meaning at all.

15. Section 403 requires that SES pay levels be set according to OPM criteria. The section also requires that the staffing of SES career appointees must be competitive, with a staffing process that meets OPM standards. Once a career executive is in place, that executive may not be involuntarily reassigned or transferred within 120 days after the appointment of an agency head. These restrictions raise the same statutory conflicts raised by the provisions of Section 402(b).

16. While the removal criteria set by Section 404 for SES non-career employees is the functional equivalent of the DCI's termination authority (50 U.S.C. 403(c)), the removal criteria for career appointees does not include anything resembling this authority.

17. All agencies, unless excluded by the President from SES, must create an SES performance appraisal system under Section 405. If an appraisal system is not in conformity with OPM regulations, OPM can order corrective action This would conflict with the aforementioned 50 U.S.C. 403(d)(3), 50 U.S.C. 403g, and 50 U.S.C. 403j.

18. Both the suspension for 30 days or more of SES employees and their removal to promote the efficiency of the service are governed by the procedures of Section 411. These procedures include a requirement of a 30 days' advance notice, a right to reply, a right to representation, and an appeal to the Merit Board. This section would result in more crippling inflexibility, more disclosure, more statutory conflicts.

19. Section 501 of Title V would place all managers in grades 9 through 15 or non-managers in grades 16 through 18 under the coverage of a merit pay plan to be established by OPM and implemented by OPM regulation. Once again OPM control would conflict with statutes in force and would result in the removal of an important management tool from the hands of CIA managers in the interests of uniformity and symmetry as determined by OPM.

20. In light of the detailed disclosure requirements of this legislative package, as well as its inadequate exclusions and its refusal to recognize the DCI's termination authority or CIA's excepted status, the opinion of this

Office is that we seek a complete exclusion from the provisions of the legislation. If a complete exclusion is not possible, CIA should only be required to maintain its personnel system in reasonable conformity with the provisions of this legislation, but under no circumstances should CIA be subject to the extreme OPM, Merit Board, and Special Counsel controls and authorities advocated in this legislation.

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